LIONG THOO

v.

SAWIYAH HJ. SIRAT & ORS.

HIGH COURT MALAYA, IPOH
NH CHAN J
[CIVIL SUIT NO. 140 OF 1973]
25 APRIL 1981

DAMAGES: *Personal Injuries - Brain damage - Loss of memory - Pain and suffering - Nursing charges - Award to reflect the fall of value of money - Loss of future earnings.*

The plaintiff, a 22 year old passenger in a motor vehicle involved in a head-on collision, sustained a fracture of the left frontal bone of the skull with extensive cerebral contusion resulting in severe permanent and irreversible brain damage. She was a washer woman and cook earning an income of RM100 per month.

Medical evidence revealed that she suffered from complete loss of memory. She was disorientated to time, places and people. She was unable to read, write or do simple sums and suffers from nominal aphasia, a form of speech defect characterised by inability to name objects. She also suffered from a very serious disorder of her emotional faculties. She was subjected to sudden outbursts of unprovoked aggression. She was unable to manage herself or her own affairs and had to depend on others to take care of her personal hygiene. Because of her unstable emotional behaviour she was kept in her room everytime her husband went to work.

As liability was admitted, the Court decided on the amount of damages for:

(a) Pain and suffering and loss of amenities.
(b) Damages for mother-in-law's nursing services.
(c) Loss of earnings.
(d) Special damages.

Held:

[1] Damages for pain and suffering is dependent on the plaintiff's personal awareness of pain and her capacity for suffering whilst damages for loss of amenities is awarded for the fact of deprivation.

[2] "Unconscious" or "vegetable" cases attracted lower awards than severe brain damage cases and awards for severe brain damage cases were comparable to awards in paralysis cases.

[3] Awards should be increased to reflect the fall of value of money.

[4] For pain and suffering a sum of RM100,000 with interest of 8% p.a. from the date of service of the Writ was awarded.

[5] Considering that the plaintiff was unable to take care of herself and will not be able to do so a sum of RM22,400 was awarded as costs of caring for her until the date of judgment together with interest at 4% p.a. from the date of service of writ and a sum calculated at RM200 per month for 20 years on an annuity basis.

[6] As for the past and future loss of earnings the Court accepted that she was earning a sum of RM100 per month and awards RM12,200 with interest at 4% p.a. from date of accident till date of judgment and a sum of RM14,952 for future loss calculated on the basis of RM100 per month on an annuity basis.

[7] The sum of RM1,868 was awarded as agreed special damages.

[Judgment for the plaintiff against the 1st and 2nd defendants with costs. The claim against the 3rd defendant is, by consent, dismissed with costs to be paid by the 1st and 2nd defendants.]

Per: Lord Denning

> We have come in recent years to realise that the award of damages in personal injury cases is basically a conventional figure derived from experience and from awards in comparable cases" said Lord Denning in *Ward* v. *James* [1968] 1 QB. 273, 303.

Cases referred to:

Lim Poh Choo v. Camden Health Authority [1980] AC 174
Yang Salbiah v. Jamil b. Harun [1981] 1 MLJ 292
Wise v. Kaye [1962] 1 QB 638
West & Son Ltd. v. Shephard [1964] AC 326
Cunningham v. Harrison [1973] 1 QB 942
Davies v. Tenby Corporation [1974] 2 LIR 469
Walker v. McLean & Sons Ltd. [1979] 1 WLR 760
Quek Poh Ser v. Jhagir Singh [1962] MLJ lxxxviii
Lim Cheng Siew v. State Advocate General [1965] 2 MLJ xxvii
Hamid v. Yeo Kim Kuan [1966] 1 MLJ 129
Yio Yak Kiang v. Green Bus Co. Ltd. [1967] 1 MLJ lxi
Raja Mokhtar v. Public Trustee, Malaysia [1970] 2 MLJ 151
Chang Fah Lin v. United Engineers [1978] 2 MLJ 259
Mitchell v. Mulholland [1972] 1 QB 65
Daish v. Wauton [1972] 2 QB 262
George v. Pinnock [1973] 1 WLR 118
Larkham v. Lynch [1974] 2 L1 R 544
Taylor v. Bristol Omnibus [1975] 1 WLR 1054
Kow Ah Dek v. Ratnasingam [1981] 2 MLJ 24
Ward v. James [1966] 1 QB 273
Pickett v. British Rail Engineering Ltd. [1980] AC 136
Cunningham v. Harrison [1973] QB 942

For the plaintiff - Ngan Siong Hing; Ngan Siong Hin & Co.
For the first and second defendants - A. Iruthaya Raj (Gurbachan Singh with him); Kean Chye & Sivalingam
For the third defendant - S.C. Navaratnam; Lewis & Co.

JUDGMENT

NH Chan J:

On 28 December 1971, the plaintiff Liong Thoo, was severely injured in a road accident. She was a passenger in a taxi that was going along the Ipoh-Kuala Lumpur trunk road. There was a collision between the taxi in which she was travelling and a car coming from the opposite direction. Negligence has been admitted against the driver of the taxi. She was 22 years of age at the time.

She suffered very severe injuries. On admission to hospital an emergency tracheotomy was done to save her life. She sustained a fracture of the left frontal bone of the skull with extensive cerebral contusion. She was in coma for two months. When she regained consciousness two months later she was almost totally blind. She regained her sight a year later.

Dr. Quek said in his evidence that in his opinion the plaintiff suffers from post traumatic dementia which condition is a result of severe brain damage. The condition is permanent and irreversible. She suffers from complete loss of memory for both recent and past events. She is disorientated to time, places and people. She cannot read, write or do simple sums and she suffers from nominal aphasia, a form of speech defect characterised by inability to name objects. She also suffers from a very serious disorder of her emotional faculties in that she is subjected to sudden outbursts of unprovoked aggression. She is unable to manage herself or her own affairs and has to depend on others to take care of her personal hygiene. Because of her unstable emotional behaviour she has to be kept in her room everytime her husband goes to work.

As liability has been admitted, the only matter that I have to decide is the amount of damages.

Pain and suffering and loss of amenities

The law on the measure of damages under this head has been settled by the recent decision of the House of Lords in *Lim Poh Choo v. Camden Health Authority* [1980] AC 174, 188 where Lord Scarman said:

> My Lords, I think it would be wrong now to reverse by judicial decision the two rules which were laid down by the majority of the House in *H. West & Son Ltd. v. Shephard* [1964] AC 326, namely: (1) that the fact of unconsciousness does not eliminate the actuality of the deprivation of the ordinary experiences and amenities of life (see the formulation used by Lord Morris of Borth-y-Gest at p. 349); (2) that, if damages are awarded upon a correct basis, it is of no concern to the Court to consider any question as to the use that will thereafter be made of the money awarded.
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> The effect of the two cases (*Wise v. Kaye* [1962] 1 QB 638 being specifically approved in *H. West & Son Ltd. v. Shephard*) is two fold. First, they draw a clear distinction between damages for pain and suffering and damages for loss of amenities. The former depend upon the plaintiff's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation - a substantial loss, whether the plaintiff is aware of it or not. Secondly, they establish that the award in *Benham v. Gambling* [1941] AC 157 (assessment in fatal cases of damages for loss of expectation of life) is not to be compared with, and has no application to, damages to be awarded to a living plaintiff for loss of amenities.

This passage was cited with approval and applied by the Federal Court in the recent case of *Yang Salbiah v. Jamil b. Harun* [1981] 1 MLJ 292.

We are in the area of 'conventional' awards for non-pecuniary loss, where comparability matters. Justice requires that such awards continue to be consistent with the general level accepted by the Judges, said Lord Scarman (*Lim Poh Choo v. Camden Health Authority, supra,* at p. 189C). He went on to say (at p. 189G), "An award for pain, suffering and loss of amenities is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment. It is, therefore, dependent only in the most general way upon the movement in money values. Like awards for loss of expectation of life, there will be a tendency in times of inflation for awards to increase, if only to prevent

the conventional becoming the contemptible. The difference between a *'Benham v. Gambling award'* and a *'West v. Shepard award'* is that, while both are conventional, the second has been held by the House of Lords to be compensation for a substantial loss. As long therefore, as the sum awarded is a substantial sum in the context of current money values, the requirement of the law is met.

It is perhaps convenient at this juncture to look at comparable cases in order to ascertain the pattern that such cases may reveal.

(i) The "unconscious" or "vegetable" cases. Such cases are *Wise v. Kaye* [1962] 1 QB 638 1962 (where a young woman of 20 suffered brain damage, she never regained consciousness, was awarded £15,000) *West & Son Ltd. v. Shephard* [1964] AC 326 1964 (where a married woman aged 41 was rendered nearly unconscious for the rest of her day. £17,500 was awarded): *Lim Poh Choo v. Camden Health Authority supra* 1980 (where £20,000 was awarded) and *Yang Salbiah v. Jamil, supra* 1981 (a recent Malaysian case, where a young girl of 7 suffered severe brain damage with very little awareness of her surroundings and who was described by the Court as being "a little better than a vegetable", RM70,000 was awarded).

(ii) The *"paralysis" cases:* Taking the English cases first, *Cunningham v. Harrison* [1973] 1 QB 942 1973 (where the plaintiff was paralysed in his body and all four limbs, £18,000 was awarded): *Davies v. Tenby Corporation* [1974] 2 LIR 469 1974 (where £20,000 was awarded); *Walker v. McLean and Son Ltd*. 1979 (where £35,000 was awarded); The Malaysian cases are, *Quek Poh Ser v. Jhagir Singh* [1962] MLJ lxxxviii 1962 (where RM65,000 was awarded for paralysis from the waist down); *Lim Cheng Siew v. State Advocate General* [1965] 2 MLJ xxvii 1965 (where RM50,000 was awarded paraplegia); *Hamid v. Yeo Kim Kuan* [1966] 1 MLJ 129 (where RM70,000 was awarded for paraplegia); *Yio Yak Kiang v. Green Bus Co. Ltd.* [1967] 1 MLJ 1xi 1967 (paraplegia, where RM70,000 was awarded); *Raja Mokhtar v. Public Trustee, Malaysia* [1970] 2 MLJ 151 1970 (where a paraplegic was awarded RM80,000) and *Chang Fah Lin v. United Engineers* [1978] 2 MLJ 259 1978 (where RM60,000 was awarded for partial paralysis of the upper limbs and total paralysis of the lower limbs).

(iii) **"Severe brain damage"** cases: First, the English cases, *Mitchell v. Mulholland* [1972] 1 QB 65 1972 (where £20,000 was awarded); *Daish v. Wauton* [1972] 2 QB 262 1972 (where £20,000 was awarded); *George v. Pinnock* [1973] 1 WLR 1186, 1973 (where £19,000 was awarded, this was thought to be at the bottom of the scale), *Larkham v. Lynch* [1974] 2 L1 R 544 1974 (where £25,000 was awarded); *Taylor v. Bristol Omnibus* [1975] 1 WLR 1054 1975 (where £27,500 was awarded) and the only recent Malaysian case is, *Kow Ali Dek v. Ratnasingam* [1981] 2 MLJ 24 1981 (where RM70,000 was awarded to a man with minimal brain damage resulting in a change in behaviour, in that he has become talkative and complaining, has lost confidence in himself and has to depend on his sister for material support, suffers from lack of concentration, poor memory, severe vertigo, headaches, fits and dizziness).

(iv) **Conclusion**: "We have come in recent years to realise that the award of damages in personal injury cases is basically a conventional figure derived from experience and from experiences and from awards in comparable cases" said Lord Denning in *Ward v. James* [1966] 1 QB 273, 303. The following patterns seem to emerge from these cases.

The first pattern that is obvious and significant is that awards in the "unconscious" or "vegetable" cases are lower than awards in the "severe brain damage" cases, and that awards in the "severe brain damage" cases are comparable to that of awards in the "paralysis" cases.

The other pattern is that there is a discernible trend for awards to increase in value in recent years. This is because Judges have taken into account the fall in the value of money.

In the case of *Yang Salbiah v. Jamil, supra*, which is a "vegetable" case, the Federal Court gave a sum of RM70,000. The instant case is not a "vegetable" case. The plaintiff suffers from very severe brain damage. In the recent case of *Kow Ah Dek v. Ratnasingam, supra*, the Federal Court confirmed an award of RM70,000 for brain damage suffered by the plaintiff which was less severe than that of the present plaintiff. Since damages in "severe brain damage" cases are comparable to that of damages in "paralysis" cases, one may look at such cases in order to arrive at a conventional comparable figure. The highest awards in the "paralysis" cases in this country are RM70,000 and RM80,000 and the trend has not changed ever since the first award was made in 1966 in the case of *Hamid v. Yeo Kim Kuan, supra,* where RM70,000 was awarded to a paraplegic. RM70,000 in 1966 or in *Raja Mokhtar's* case, *supra,* RM80,000 in 1970, are not the same today in monetary terms. The award has to be one which represents a comparable amount in current money values at the time when the award is made: see *Pickett v. British Rail Engineering Ltd.* [1980] AC 136 In that case Lord Wilberforce said (at p. 151D)

> Increase for inflation is designed to preserve the 'real' value of money: interest to compensate for being kept out of that 'real' value. The one has no relation to the other. If the damages claimed remained nominally, the same, because there was no inflation, interest would normally be given. The same should follow if the damages remain in real terms the same. And Lord Scarman (at p. 173) said, "It is assumed that because the award of damages made at trial is greater, in monetary terms, than it would had been, had damages been assessed at date of service of writ, the award is greater in terms of real value. There is here a complete non sequitur. The cash awarded is more, because the value of cash, i.e. its purchasing power, has diminished ... In theory, therefore, and to some extent in practice, inflation is taken care of by increasing the number of money units in the award so that the real value of the loss is met. The loss, for which interest is given, is quite distinct, and not covered by this increase. It is the loss which is suffered by being kept out of money to which one is entitled.

The plaintiff has suffered very severe brain damage and when one takes into account all the other factors, when one considers the damage done to the mental faculties of this woman, when one considers the mental and physical limitations imposed upon her, I think a proper sum for me to award for general damages under this head is RM100,000. This sum will of course bear interest at 8 per cent per annum from the date of service of writ.

Damages for mother-in-law's nursing services

The plaintiff was looked after by her mother-in-law with devotion and care since the accident, i.e., since 28 December 1971. She did the cooking and washing of her clothes as well as feeding the plaintiff and looking after her personal hygiene.

In *Cunningham v. Harrison* [1973] QB 942, 952 Lord Denning MR said:

> ... It seems to me that when a husband is grievously injured - and is entitled to damages - then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered.

In *Davies v. Tenby Corporation* [1974] 2 L1R 469 Scarman LJ said (at p. 479):

> It is immaterial, I think, whether the plaintiff be regarded as recovering for himself beneficially or as a trustee for the donor of the services. The defendants' wrong has created a need for the services. Nursing and attendance are services which can only be provided by an expenditure of effort or money, or both: an estimate must be made of the capital value of such effort and money, past and future, and compensation awarded accordingly. How or on what terms they are provided is not of critical importance: the extent to which they have been, are now, and are likely in the future to be needed is all important, and the Court, looking at all the circumstances including the market price of such services, must put a fair value upon them ...

In *Taylor v. Bristol Omnibus Co. Ltd.* [1975] 1 WLR 1054 Lord Denning MR said (at p. 1058G):

> ... The doctor said that it would be better for Paul to be with the family as long as possible. Most of us have known of similar sad cases. I should have thought that these devoted parents would have kept Paul at home with them as long as they could. They would do so until they themselves were too old to do it. They would give their own lives for him. And then someone else in the family would do it.
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> If such is the future, the question arises: is his compensation to be less because he is looked after at home instead of in an institution? I do not think so. I am glad to say that as a result of recent cases, compensation can be given in money for services rendered by the parents. It has been so held when a wife gave up work to look after her husband: see *Wattson v. Port of London Authority* [1969] 1 Lloyd's Rep. 95, 101, 102: when she did not give up work but, nevertheless , devoted her life to looking after him: see *Cunningham v. Harrison* [1973] QB 942, 951, 952; and when a mother gave up work to look after her child: see *Donnelly v. Joyce* [1973] QB 454. In *Hay v. Hughes* [1975] 2 WLR 34, 44, Lord Edmund-Davies said that 'the injured plaintiff can recover the value of nursing and other services gratuitously rendered to him by a stranger to the proceedings.

Approaching the present case on these broad principles which I have just read, taking into account that she was only 22 at the time of the accident, and also taking into account today's values and the cost of a servant and the value for the mother-in-law's services, I would put the value of such services at RM200 a month cost of care or services to date of judgment is therefore to be calculated at the rate of RM200 a month from the date of the accident: RM22,400, with interest at 4 per cent per annum from the date of service of writ to date of judgment.

For cost of future care and services, I would take a multiplier of 20 at RM200 a month to be calculated on an annuity basis (see *Lim Poh Choo v. Camden Health Authority* [1980] AC 174, 188 at p. 192H): RM29,904.

Loss of earnings

There is evidence, which I accept, that the plaintiff was employed by her sister-in-law at her maternity home prior to the accident, as a washer woman and cook. She was paid RM100 a month.

She should be compensated for this loss from the date of the accident to date of judgment at the rate of RM100 a month: RM12,200, with interest from the date of service of writ to date of judgment at 4 per cent per annum.

As for her future loss, I would take a multiplier of 20 and a multiplicated of RM100 to be calculated on an annuity basis: RM14,952. I take this course because it is not unusual for people in the plaintiffs station in life to continue working in order to supplement the husband's income for as long as they could to maintain their home and family.

Special damages

This has been agreed at RM1,868.

Also found at [1981] CLJ 126